No. 82-1874

Office Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1982

DAVID W. DEAKYNE,

Petitioner,

vs.

DEPARTMENT OF THE ARMY CORPS OF ENGINEERS, UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. In failing to follow the established rules for the construction of a statute, did not the court of appeals deprive Deakyne of the due process of law guaranteed by the Fifth Amendment of the United States Constitution?

2. Did not the court of appeals err by, contrary to the law, predicating its opinion and decision on legislative history comprised of the single letter subject to several interpretations rather than by *construing the 1924 Act of Congress itself which is plain, clear* and unambiguous?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Citations ii

Opinions Below 1

Jurisdiction 2

Constitutional Provision Involved 2

Statement of the Case 2

Reasons for Granting the Writ 6

Conclusion 14

TABLE OF CITATIONS

Cases Cited:

American Oil Company v. Leamon, 101 S.E. 2d 540 (Ct. of App., Va. 1958) 13

Application of United States, 563 F. 2d 637 (4th Cir. 1977) 11

Briscoe v. Levi, 535 F. 2d 1259 (D.C. 1976) 12

Calvert Cliffs Coordinating Com. v. United States, et al., 449 F. 2d 1109 (D.C. 1971) 7, 10

Contents

Page

Carter Oil Company v. Myers, et al., 105 F. 2d 259 (7th Cir. 1939) 9

Childress v. Silver, 272 S.W. 2d 417 (Tex. 1954) 8

Community Blood Bank of Kansas City Area, Inc. v. F.T.C., 405 F. 2d 1101 (8th Cir. 1969) 12

Co-Operative Grain and Supply Co. v. C.I.R., 407 F. 2d 1159 (8th Cir. 1969)..... 12

Fairport R. and E.R. Company v. Meredith, 292 U.S. 589, 54 S. Ct. 826, 78 L. Ed. 1446 (1934) 7

Hudson v. American Oil Co., 253 F. 2d 27 (4th Cir. 1958) 13

In Re: Purdy, 16 B.R. at 858 (Dist. Ct., Ga. 1981) 10

Jersey Farm Co. v. Atlanta Realty Co., 129 P. 593 13

Kuehner v. Irving Trust Company, 299 U.S. 445, 57 S. Ct. 298 (1937)..... 10

Melo v. National Fuse and Powder Co., 267 F. Supp. 611 (Dist. Ct., Colo. 1967) 13

Osborne v. Massachusetts Bonding and Insurance Company, 229 F. Supp. 674 (Ariz. 1964)..... 11

Re: Greek Catholic Congregation of the Borough of Olymphant v. Plumber, 32 A. 2d 299 (Pa. 1943) 8

Contents

Page

Sode v. United States, 531 F. 2d 531 (U.S. Ct. Cl. 1976) 11

Souder v. Brennan, 367 F. Supp. 812 (Dist. Ct., Ill. 1973) 12

United States v. The American Trucking Association, 310 U.S. 534, 60 S. Ct. 1059 (1940) 7

United States v. Cooper Corporation, 312 U.S. 600, 61 S. Ct. 742 (1941) 7

United States v. Scrimgfour, 636 F. 2d 1019 (5th Cir. 1981) 7

United States v. Smith, 209 F. Supp. 907 (E.D. Ill., 1962) 11

United States v. Speidel, 562 F. 2d 1129 (8th Cir. 1977) 8

Statutes Cited:

Act of March 15, 1924, S. 2431 ....i, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14

28 U.S.C. §1254(1)..... 2

28 U.S.C. §2409a(f) 3, 4, 6

Laws of Delaware Dated April 4, 1887, Chapter 139, Title Eight, 18 Laws of Delaware 210 (1887)....3, 8, 9, 10, 11

Contents

Page

United States Constitution Cited:

Fifth Amendment .....i, 2, 6, 12

Other Authorities Cited:

16 Am. Jur. 560 9

26 C.J.S. §1 8

26 C.J.S. §8 9

APPENDIX

Order of the United States Court of Appeals for the Third Circuit Denying Rehearing Filed March 29, 1983 .... 1a

Opinion of the United States Court of Appeals for the Third Circuit Filed March 4, 1983 ..... 2a

Judgment of the United States Court of Appeals for the Third Circuit Filed March 4, 1983 ..... 16a

Memorandum of Decision of the United States District Court for the District of Delaware Filed January 29, 1982 . 18a

Act of March 15, 1924 S. 2431 ..... 35a

Letter from Secretary of War to Senator Wadsworth 37a

No.

In The

Supreme Court of the United States

October Term, 1982

DAVID W. DEAKYNE,

Petitioner,

vs.

DEPARTMENT OF THE ARMY CORPS OF ENGINEERS, UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

David W. Deakyne, by and through his attorneys, Basil C. Clare, Esquire, and John H. Benge, Jr., Esquire, respectfully petitions this Court to issue a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Third Circuit, entered in this proceeding on March 4, 1983.

OPINIONS BELOW

The opinion of the district court is set forth at 530 F. Supp. 1322 (1982) and is attached hereto in the Appendix, pages

18a-34a. The opinion of the court of appeals is set forth at Appendix pages 2a-15a.

JURISDICTION

Attorneys for David W. Deakyne petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case. Judgment sought to be reviewed was entered March 4, 1983. Petition denying rehearing was entered March 29, 1983. Statutory provisions believed to confer on this Court jurisdiction to review the judgment or decree in question by writ of certiorari is the violation of the Fifth Amendment to the United States Constitution in construing the 1924 Act of Congress. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall . . .be deprived of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

This petition arises from an action brought by David W. Deakyne against the United States to quiet title to 2.25 acres of marshland located on and containing approximately four hundred (400) feet of frontage on the northeasterly side of the Lewes and Rehoboth Canal in the City of Lewes, Delaware.

By the Act of 1887 the Delaware Legislature authorized the condemnation of the land for use by the United States for construction of a canal. The original plans for the canal would

have left the land submerged; however, the canal as ultimately built in 1927 bypassed the land and so, the Government never used this land for the purpose acquired or for any other use.

Deakyne traces his interest in the land from a chain of conveyance back to the original condemnees.

In 1963, counsel for Deakyne inquired of the Corps of Engineers as to whether or not the Corps claimed a fee title to the land in question and was informed by the District Engineer that at that time the Corps of Engineers did not claim or hold title to the land, but that the Corps of Engineers held a perpetual easement in the land, perpetual easement being a term coined by the District Engineer since the Corps of Engineers received only an easement to construct the canal by the Delaware Act of 1887.

However, in 1975 when your petitioner started negotiations to release the easement, the Corps for the first time stated that they held a fee simple interest to the land. When negotiations finally broke down, Deakyne instituted this action.

The district court construed the Delaware Act of 1887 authorizing condemnation of the land for canal purposes as permitting only the taking of an easement and concluded that the United States' interest was limited to an easement and that its claim to a fee simple had failed. However, the district court held that §2409(a)(f) of the Act of 28 U.S.C. (twelve-year statute of limitations) barred Deakyne's claim that the United States had abandoned the easement obtained from Delaware in 1892. The court reasoned that the facts on which Deakyne's abandonment argument was based was known by Deakyne and his predecessors in interest since 1912 when the project was rerouted.

The Corps of Engineers did not challenge the district court's finding that the Delaware Act of 1887 gave the Government an

easement only for canal purposes, but, through its counsel, contended that the Act of Congress passed in 1924 (which was an Act passed by Congress to reconvey back to the State of Delaware that land condemned for canal purposes, but never used) conveyed a fee title and put Deakyne on notice of the Government's claim of a fee title interest. By this reasoning Deakyne would also be barred from challenging the Corps' claim to a fee by §2409(a)(f) of 28 U.S.C.[1]

Deakyne contended that the Act never conveyed back to the State of Delaware a fee, nor did the Act put Deakyne on notice of the Corps' claim of a fee, but that the Act merely extinguished the Government's easement in the land which was never used for canal purposes. This called upon the court to interpret the Act of 1924.

The court erroneously made no effort to interpret the Act of 1924, although the language was plain, simple and unambiguous. Instead, the court predicated its decision upon legislative history consisting of a single letter which was sent by the Secretary of War to Senator Wadsworth[2] (a letter subject to several interpretations).[3]

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1. The Corps argued that since a small part of the land being reconveyed belonged prior to condemnation to several landowners other than the State of Delaware the Government has a fee title to all the lands being reconveyed since otherwise the several small tracts would have to be returned to the precondemnation owners if only an easement was being reconveyed.

2. *See* Appendix.

3. Note: In the Secretary of War's letter he talked about possession, not title. Therefore, we must believe the Secretary knew the Government did not have title to give.

Another interpretation would be: The Secretary of War was more interested in protocol than what interest the Government had to give and since the State

(Cont'd)

On page 10a of its opinion the court stated:

> This legislative history makes it clear that Congress did not understand that, in conveying the land to the State, it was returning the land to the pre-1887 fee owner. Thus, Congress could not, as Deakyne argues, have meant merely to extinguish an easement, for this intention could only be fulfilled by conveying the United States' interest to the pre-1887 owner. In the face of the legislative history, *it cannot be maintained that Congress* understood the State to have been the pre-1887 owner of the land conveyed. We therefore think that the Govenment's construction of the Act as conveying a fee interest must prevail.

For the first time on appeal to the circuit court, the Corps of Engineers raised the Congressional Act of 1924. At no time previously had the Government's contention in relation to this Act been made. To sustain the Corps of Engineers' arguments, Circuit Judge Becker, without attempting to construe the Act of 1924, predicated his decision upon legislative history which consisted of a letter from the Secretary of War to one of the senators. This letter was subject to several interpretations and it is hard to see that the letter in any respect supported Judge Becker's opinion.

The only place that the federal question could be raised insofar as the petitioner is concerned was in his petition for panel

---

(Cont'd)
had established the machinery and paid the bill for the State's condemnation, that which had been taken from the State should be returned to the State, not to one of its municipalities. It was the State of Delaware's fee which was diminished by the easement and therefore, the State should receive that interest back.

rehearing. Here petitioner specifically pointed out that the judge failed to follow the rules of construing the Act of 1924, depriving the petitioner of due process of law as guaranteed by the Fifth Amendment.

On page 8 of Deakyne's petition for panel rehearing, counsel states as follows:

> Therefore, the Court having predicated its opinion on legislative history where the Act to be construed was plain, clear and unambiguous, and further, having failed to follow the prescribed rules in construing a statute, the Court has erred. *Quare: Has not Deakyne been deprived of the due process of law which is guaranteed by the Fifth Amendment of the United States Constitution?*

Deakyne's action is based on an Act of Congress set forth in 28 U.S.C. §2409a(f).

REASONS FOR GRANTING THE WRIT

It is Deakyne's contention that the court erred in predicating its opinion and decision upon legislative history because the court had the duty first to examine and construe the 1924 Act of Congress since the meaning of the Act was clear and unambiguous. The court had the duty to determine from the Act itself whether or not the Government was conveying a fee.

In the process of construing federal statutes the established rules for the construction of statutes prevail. The court has the duty of deciding what was the intention of the Congress from the Act.

> The primary rule as to statutes is to ascertain and declare the intention of Congress.

United States v. Cooper Corporation, 312 U.S. 600, 61 S. Ct. 742 (1941).

> And once the intention is discovered, it is the duty of the Court to carry such intention into effect.

United States v. The American Trucking Association, 310 U.S. 534, 60 S. Ct. 1059 (1940); *United States v. Scrimgfour,* 636 F. 2d 1019 (5th Cir. 1981).

> *However, where the language of a statute is unambiguous, consideration of the legislative history is not permissible.*

Fairport R. and E.R. Company v. Meredith, 292 U.S. 589, 54 S. Ct. 826, 78 L. Ed. 1446 (1934); *Calvert Cliffs Coordinating Com. v. United States, et al.,* 449 F. 2d 1109 at 1126 (D.C. 1971).

Certainly the intention of Congress was clear. There was a certain right of way which was condemned for construction of the Lewes Rehoboth Canal back in 1887 over land which was never used for canal purposes. And so, the intent of Congress was to extinguish its easement so that the land could be used by its original owners.

Practically all the words of the Act of 1924 have to do with the description of the land upon which the servitude was imposed that was being conveyed. There are only three words that require any interpretation and they are "grants", "quitclaims" and "reconveys".

The word "reconvey" is certainly not ambiguous. Webster defines the word as "to convey back to a previous position or owner". That is exactly what Congress wanted to do. They wanted to give back to the state that which they took from the state but did not use.

To follow the Government's argument there would be no *reconveyance* since the Government only got an easement by the Act of 1887. Yet, the circuit court argues that by the 1924 Act of Congress the Government was giving back a fee. That is, the Government would be giving back something other than it had received.

The word "quitclaim" has a very definite meaning and is not in the least ambiguous. The word "quitclaim" is the most important word of the three and puts everyone on notice that that which is being conveyed *is only that which the grantor had.* It could be a sizeable interest or no interest at all.

The difference in a quitclaim conveyance and a conveyance of fee is significant.

> In a quitclaim conveyance the conveyance purports merely to convey whatever title to the particular land the grantor may have had and its use excludes the implication that he has a good title or any title at all.

Childress v. Silver, 272 S.W. 2d 417 at 418 (Tex. 1954).

> The distinguishing characteristic of a quitclaim conveyance is that it is a conveyance of the grantor's interest in a property rather than the property itself.

Re: Greek Catholic Congregation of the Borough of Olymphant v. Plumber, 32 A. 2d 299 (Pa. 1943); *United States v. Speidel,* 562 F. 2d 1129 (8th Cir. 1977).

The word "convey" is significant in the Act since it is this word that makes the instrument a conveyance. Otherwise, it would be a simple release. *See* 26 C.J.S. §1.

Grant and convey are synonymous.

> The words "grant" and "convey" used in an instrument of conveyance are not incompatible with conveyance of a lesser interest than the fee and if it appears from other language of the instrument that something other than conveyance in fee was contemplated, effect must be given to other language. (In this case "quitclaim").

Carter Oil Company v. Myers, et al., 105 F. 2d 259 (7th Cir. 1939).

In 16 Am. Jur. at page 560 we find as follows:

> A quitclaim deed is closely related to a simple release, but has come to be recognized as a distinct form of conveyance where the grantor has anything to convey, especially where the words of grant are used and where the grantor has nothing to convey his quitclaim will be regarded as merely a release or a formal disclaimer, notwithstanding the additional words of grant or of a warranty.

See also, 26 C.J.S. §8.

Certainly Congress never intended to give back more than the Government had gotten from the State of Delaware, nor was there any intent to give less. The Act stipulates a reconveyance since by the term quitclaim Congress was conveying back to the State of Delaware that which the Government had acquired. Therefore, it is important in determining the intent of the 1924 Act of Congress what it was that the Government acquired by the Act of 1887. This question has already been settled by the court below and by the circuit court. The district court held that the Corps of Engineers, Department of the Army, had acquired an *easement only* by the Act of 1887 and the Government too,

since the Government had not challenged the district court's interpretation of the Delaware Act of 1887. Thus, having determined the intent of Congress by the words of the Act itself, we conclude that all that the Government had acquired was an easement in the land in question and that was all that the Government could reconvey back to the State of Delaware.

Where a deed purports to convey more than the grantor owns, the deed will pass such interest that the grantor owns only. A conveyance by Act of Congress could do no more.

The construction of the Act is simple and resting its decision on the Secretary of War's letter which is subject to several interpretations rather than the express terminology of the Act itself, the circuit court has erroneously reached a decision which modifies and destroys the intention of Congress. Construing the 1924 Act of Congress, then it must be concluded that Congress never acquired a fee and never intended to convey a fee simple title by the Act. It intended to reconvey whatever interest it had acquired by condemnation which was only an easement. There can be no other construction and a remand on this point is not necessary since nothing in the Act of 1924 could put Deakyne on notice of the alleged claim to a fee.

> The legislative history of a statute may not compel construction at variance with its plain words.

Kuehner v. Irving Trust Company, 299 U.S. 445, 57 S. Ct. 298 (1937); *Calvert Cliffs Coordinating Com. v. United States, et al.,* 449 F. 2d 1109 (D.C. 1971); *In Re: Purdy,* 16 B.R. at 858 (D.C. Ga. 1981).

> The Court shall attempt to effectuate the purpose of the federal legislation and avoid interpretations which produce absurd or nugatory results.

Application of the United States, 563 F. 2d 637 (4th Cir. 1977); *Sode v. United States,* 531 F. 2d 531 (U.S. Ct. Cl. 1976).

But the court's interpretation does just that. The court has found that the Delaware Act of 1887 gave only an easement to the Government, but that the 1924 Act of Congress gave back to the State of Delaware a fee.

> The Court should not interpret a statute in such a manner as to strip it of its meaning, but rather should look to the *statute as it is written* and give to it the same meaning that was intended by Congress at the time of its enactment.

United States v. Smith, 209 F. Supp. 907 (E.D. Ill. 1962).

> In construing legislation the Court is bound to place their own construction as will accomplish the legislative intent and if possible avoid a broad conclusion or construction which would render the statute invalid or unconstitutional.

Osborne v. Massachusetts Bonding and Insurance Company, 229 F. Supp. 674 (Ariz. 1964).

Since the Court affirmed the lower court on the meaning of the Act of 1887, the Court had knowledge and knew that the only interest which the Government had acquired was that of an easement. Then to permit an interpretation of the Act of 1924 which would hold the Government was conveying a fee just would not be consistent. For how could the Congress by Act convey a fee when in truth all that it owned was an easement.

Finally:

> The construction of a statute that creates some result contrary to the intention of the legislature should not prevail.

Briscoe v. Levi, 535 F. 2d 1259 (D.C. 1976).

> The general rule of statutory construction requires the Courts to ascertain the intent of the legislature from the *language it used.*

Community Blood Bank of Kansas City Area, Inc. v. F.T.C., 405 F. 2d 1101 (8th Cir. 1969); *Souder v. Brennan,* 367 F. Supp. 812 (Dist. Ct. Ill. 1973); *Co-Operative Grain and Supply Co. v. C.I.R.,* 407 F. 2d 1159 at 1161 (8th Cir. 1969).

Therefore, the court having predicated its opinion on legislative history where the Act to be construed was plain, clear and unambiguous, and further, having failed to follow the prescribed rules in construing a statute, the court has erred and Deakyne has been deprived of the due process of law which is guaranteed by the Fifth Amendment of the United States.

The land included in the conveyance under the Act of 1924 was mostly land which was condemned while under the management of the Town of Lewes of what was considered state-owned land (part of the Warner Tract created by William Penn). It may have included one or two other pieces of land which the Government considered inconsequential; however, it does not follow that because the Act of 1924 included other lands than that which was previously owned by the State of Delaware that the Act necessarily created a conveyance of fee title. If the Government got an easement only to construct the canal and then tried to convey that easement after the route had been abandoned and the new canal constructed, the Government would have nothing to convey of that taken from the third party and thus, to them the 1924 Act of Congress was a release.

Insofar as the land previously owned by the State of Delaware was concerned, the 1924 Act of Congress was a release and a quitclaim conveyance. However, whether the Act of 1924 is a release or a quitclaim conveyance is not that significant since the Act is a formal disclaimer of the Government's interest in writing and that is all it takes to permit the former owners of the land, no matter who they are, to use their land free of the Government's easement.

Easements may be released by a deed or other writing. A quitclaim deed as defined by Bouvier is a form of a deed in the nature of a release.

> Release is the appropriate word for the extinguishment of an easement.

Jersey Farm Co. v. Atlanta Realty Co., 129 P. 593.

> Release may be gratuitous or for a consideration.

Melo v. National Fuse and Powder Company, 267 F. Supp. 611 (Dist. Ct., Colo. 1967).

> An easement may be terminated by completion of the purpose for which it was granted.

Hudson v. American Oil Company, 253 F. 2d 27 (4th Cir. 1958), *affirming. American Oil Company v. Leamon,* 101 S.E. 2d 540 (Ct. of App., Va. 1958).

CONCLUSION

In conclusion then, Deakyne urges this Court to construe the Act of 1924 from the wording of the Act itself and find that the Act of 1924 merely extinguished its unused easement and not that the Act of 1924 conveyed fee simple title to the land described.

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING REHEARING FILED MARCH 29, 1983

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 82-1162 & 82-1248

DAVID W. DEAKYNE,

Appellant in 82-1162

v.

DEPARTMENT OF THE ARMY, CORPS OF ENGINEERS, UNITED STATES OF AMERICA,

Appellant in 82-1248

(D.C. Civ. No. 78-344)

SUR PETITION FOR REHEARING BEFORE ORIGINAL PANEL

Present: ADAMS, HUNTER, and BECKER, *Circuit Judges*

The petition for rehearing filed by David W. Deakyne in the above entitled case having been submitted to the judges who participated in the decision of this court and no judge who concurred in the decision having asked for rehearing, the petition for rehearing is DENIED.

BY THE COURT:

s/ (illegible)
Circuit Judge

DATED: March 29, 1983

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED MARCH 4, 1983

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 82-1162 & 82-1248

DAVID W. DEAKYNE,

Appellant in 82-1162

v.

DEPARTMENT OF THE ARMY CORPS OF ENGINEERS, UNITED STATES OF AMERICA,

Department of the Army, *Appellant* in 82-1248

On Appeal from the United States District Court for the District of Delaware

(D.C. Civ. No. 78-344)

Argued September 14, 1982

Before: ADAMS, HUNTER, and BECKER, *Circuit Judges*

(Filed March 4, 1983)

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Opinion

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OPINION OF THE COURT

BECKER, *Circuit Judge.*

This appeal and cross-appeal arise from an action brought by David W. Deakyne against the United States to quiet title to 2.25 acres of marshland located on the northeasterly side of the Lewes and Rehoboth Canal in the City of Lewes, Delaware.[1] The

1. Jurisdiction is based on 28 U.S.C. §2409a (1976), also known as the "Quiet Title Act," and *id.* §§1346(f) (exclusive jurisdiction of district courts over suits brought under §2409a) and 1402(d) (§2409a suits to be brought in district in which land located). We agree with the district court's holding that §1346(f) confers jurisdiction on the district courts to hear §2409a actions to quiet title in real property in which the United States claims an interest, without regard to the value of the land involved. *See* Deakyne v. Dep't of Army, 530 F. Supp. 1322, 1324-25 (D. Del. 1982).

case has a venerable history, extending back to 1887, when the Delaware legislature authorized condemnation of the land for use by the United States for construction of a canal. The original plans for the canal would have left the land submerged; however, the canal, as ultimately built in 1927, bypassed the land.

Deakyne traces his interest in the land through a chain of conveyances back to the original condemnees. In 1963, his immediate predecessor in interest, his mother, initiated negotiations with the United States Army Corps of Engineers seeking to obtain a release of claims by the United States. Deakyne took up these negotiations when his mother conveyed her interest in him in 1973. Prior to 1975, the Corps represented that the United States held a perpetual easement in the land. In 1975, however, Deakyne received a letter from the legal department of the Corps stating that the Corps' attorneys understood the Delaware statute to have authorized condemnation of a fee rather than an easement, and that the United States therefore held a fee simple interest in the land. Deakyne also claimed a fee interest, and when negotiations finally broke down in early 1978, he instituted this action.[2]

The background facts are extremely detailed. They are amply set forth in the thoughtful opinion of the district court, *see Deakyne, supra* note 1, and we will not repeat them here. For present purposes we need only explain the procedural history of the case and the contested issues, as well as the reasons for our disposition.

---

2. Under 28 U.S.C. §2409a(a), "[t]he United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights."

Opinion

After development of a record in the district court, both Deakyne and the Government moved for summary judgment. The Government asserted that 28 U.S.C. §2409a(f),[3] which bars claims brought under section 2409a more than twelve years after the plaintiff or any predecessor in interest knew or should have known of the Government's claim to an interest in the land, divested the district court of jurisdiction to decide Deakyne's claims.[4] The court rejected this argument, noting that because the Government has first laid claim to a fee interest, as opposed to an easement, in 1975, Deakyne's suit was brought well within the statutory period. The court then construed the 1887 Delaware statute authorizing condemnation of lands for the canal as permitting only the taking of easements, concluding that the United States' interest was limited to an easement and that its claim to a fee

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3. Section 2409a(f) reads:

> Any civil action under this section shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

This section also limits the retroactive effect of the Quiet Title Act, since the limitations period runs even though the action "accrued" prior to the passage of the Act. *See Deakyne, supra* note 1, 530 F. Supp. at 1325.

4. A waiver of sovereign immunity by the United States may be made subject to any (constitutional) conditions Congress wishes to impose, and those conditions are to be strictly construed. *See, e.g.*, Lehman v. Nakshian, 453 U.S. 156 (1981) (no right to jury trial in suit against United States); United States v. Kubrick, 444 U.S. 111 (1979) (courts not to extend statute of limitations, which is condition on waiver of sovereign immunity, beyond what Congress intended). The running of a statue of limitations on an action against the United States does not provide the Government with a waivable defense; it deprives the court of jurisdiction. United States v. Sams, 521 F.2d 421, 428 n.39 (3d Cir. 1975).

simple failed. However, the court also held that section 2409a(f) barred Deakyne's claim that the United States had abandoned the easement obtained from Delaware in 1892.[5] The court reasoned that "the facts on which [his abandonment argument] is based have or should have been known to him and his predecessors in interest since 1912 when the project was rerouted." 530 F. Supp. at 1327.

The Government has appealed, first contending that, because Deakyne's predecessor in interest knew at the time of condemnation that the United States claimed *some* interest in the land, the district court was without jurisdiction to adjudicate the United States' interest—be it a claim to the fee or merely to an easement. In the alternative, the Government argues that the circumstances surrounding the United States' reconveyance in 1924 of some of the lands acquired from the State of Delaware pursuant to the 1887 statute clearly put Deakyne's predecessor in interest on notice that the United States claimed to possess a fee to all such lands.[6] Thus, says the Government, Deakyne's cause of action "accrued" in 1924 and was extinguished 12 years later, in 1936, and the district court therefore was without jurisdiction in 1978 to adjudicate the United States' claim to a fee. The Government

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5. Pursuant to the 1887 statute, the land was condemned by the State and conveyed to the United States in 1892.

6. The Government does not challenge, even on the basis of an assumption *arguendo* that jurisdiction obtains, the district court's determination on the merits that the 1887 Delaware statute limited the Government's interest to an easement. This possible *sub silentio* concession on the merits, however, does not subvert the Government's argument that the 1924 Act put Deakyne's predecessor on notice of the United States' claim to a fee, thus commencing the running of the statute of limitations and depriving the district court of jurisdiction to make a determination on the merits.

did not advance this contention in the district court, and we ordinarily are unwilling to consider arguments not made below. In this case, however, the issues raised by the Government concerning the 1924 events are jurisdictional, *see supra* note 5, and can be raised at any time.[7] Deakyne has cross-appealed, asserting that the court should have taken jurisdiction over the claim that the Government abandoned its easement.

We agree with the district court's analysis of the first contention raised in the Government's appeal, and we will not discuss it further. However, we will remand for the limited purpose of allowing the district court to determine whether the 1924 events, not previously considered, warrant a finding that Deakyne's predecessor in interest should have known that the Government, in 1924, was claiming a fee interest in Deakyne's land. As to Deakyne's cross-appeal, we will affirm.

I.

In 1924, Congress enacted a bill reconveying to the State of Delaware a portion of the land originally donated by the State to the United States pursuant to the 1887 Delaware statute. The reconveyed land did not include the Deakyne land. The Act by its terms appears to have conveyed a fee: "Be it enacted . . .

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7. "On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it." Mansfield, Coldwater & Lake Michigan Railway Co. v. Swan, 111 U.S. 379, 382 (1884)); *accord* Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 68 (1978); Andrus v. Charlestone Stone Prods. Co., 436 U.S. 604, 607 n.6 (1978); *see* Fed. R. Civ. P. 12(h)(3). Thus, we must consider the Government's argument even though it is raised here for the first time.

That the United States hereby grants, quitclaims, and reconveys to the State of Delaware all that certain piece or parcel of land situate in Lewes and Broadkill Hundred . . ." Pub. L. No. 160, 43 Stat. 245 (1924), Government's Brief at 12. The Government argues that if the United States claimed only an easement for the construction of a canal, Congress would not have purported in 1924 to convey unrestricted title to the land to the State of Delaware which was not the owner of the the underlying fee. In the Government's submission this Act therefore shows that Congress understood the United States to have held a fee interest in all the land reconveyed and by implication in all lands that had been condemned purusant to the 1887 Delaware statute for use in the canal project. The Government also submits that the Act provided notice of the United States' claim to everyone claiming any interest in any such lands. The Government concludes that this purported statutory conveyance of an unrestricted fee interest in adjacent lands should have put Deakyne's predecessor in interest on notice of the claim by the United States to a fee in the property now in dispute, thus barring Deakyne's suit in its entirety under §2409a(f).

While we intimate no view as to whether the Goverment should prevail on this argument, it is at least a colorable one. There is, however, a predicate question of fact to be resolved. Deakyne claims that the property reconveyed by the 1924 Act was part of the so-called "Warner Grant," fee title to which resided with the State of Delaware in 1887, so that the State retained fee title to that property when it was donated to the United States for canal purposes pursuant to the 1887 Delaware statute, *see United States v. 1,010.8 Acres, More or Less, Situate in Sussex County, Delaware*, 56 F. Supp. 120, 129-30, 144 (D. Del. 1944).[8]

8. The "Warner Grant" was made by William Penn, as proprietor of Delaware, to Edward Warner and the inhabitants of Lewes and of Sussex County, (Cont'd)

He also claims that all parties—the United States, the State of Delaware, and the successors in interest of the 1887 condemnees—understood in 1924 that the United States held only an easement in the land it proposed to reconvey to the State. Because the 1924 statute reconveyed the land to the State of Delaware, Deakyne asserts, it did no more than officially extinguish the easement. Thus, Deakyne concludes, the 1924 Act did not notify claimants to neighboring lands that the United States understood its interest to be a fee.

The Government controverts Deakyne's factual assertion, claiming that "the exact boundaries of the Warner Grant are unknown," Government's Reply Brief at 5. The Government argues further that the legislative history supports its interpretation of the 1924 Act as conveying a fee to a party other than the pre-1887 fee owner. An earlier draft of the bill, which would have authorized conveyance of the land directly to the City of Lewes, was modified pursuant to the advice of the Secretary of War. The Secretary's letter, which was incorporated into the legislative history, asserts that "[t]he State of Delaware, in pursuance of [the 1887 Delaware Statute], *acquired by condemnation* the lands required as a right of way for this waterway . . . *The parcel described in the bill is a part of the lands thus condemned and conveyed by the State.*'" H. R. Rept. No. 672, 68th Cong. 1st Sess. 2 (1924), Government's Brief at 11 (quoting Secretary of War's letter) (emphasis added). The letter also appears to assume

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(Cont'd)
on January 10 and 11, 1682/3 (1682 by the Julian Calendar, which was in effect in the British Colonies at the time). *United States v. 1,010.8 Acres, supra,* 56 F. Supp. at 127. Warner's interest has been lost to the ages, but the citizens of Lewes and Sussex County, at least until 1944 when *United States v. 1,010.8 Acres* was decided, held a right of common to the land, administered by the state through the Commissioners of Lewes as trustees.

that the United States was free to dispose of the land to anyone and did not have to limit the grantee to using the land for canal purposes, for it concludes that "as the State of Delaware condemned and paid for the land and donated it to the Government for a special purpose for which it is no longer needed, it is thought that good faith requires that it be returned to the State *rather than to anyone else.*'" *Id.* (Emphasis added.)

As we have noted above, the language of the Act bespeaks conveyance of a fee interest rather than relinquishment of easement rights to the owner of an underlying fee. Further, this legislative history makes it clear that Congress did not understand that, in conveying the land to the State, it was returning the land to the pre-1887 fee owner. Thus Congress could not, as Deakyne argues, have meant merely to extinguish an easement, for this intention could only be fulfilled by conveying the United States' interest to the pre-1887 owner. In the face of the legislative history, it cannot be maintained that Congress understood the State to have been the pre-1887 owner of the land conveyed. We therefore think that the Government's construction of the Act as conveying a fee interest must prevail.

Even if the Act purports to convey a fee interest in lands adjacent to Deakyne's, there remains a question whether the Act provided notice to Deakyne's predecessor in title that the United States claimed a fee interest in his property. Section 2409a(f) states that a cause of action accrues under section 2409a when plaintiff's predecessor in interest knew or *should have known* of the United States' claim. *See supra* note 3. There are thus two issues to be resolved. The first is whether Deakyne's predecessor in interest reasonably could have understood the reconveyed land to have belonged in 1887 to the State of Delaware and read the 1924 Act to be a relinquishment of an easement rather than a conveyance

of a fee.[9] If so, a cause of action did not "accrue" in 1924 and the statute of limitations in section 2409a(f) did not then begin to run. Whether such a belief was reasonable depends in part on whether the land was in fact part of the Warner Grant. The second issue is whether Deakyne's predecessors in interest should have understood, on the basis of the 1924 Act, that Congress' claim to a fee extended to *all* the lands condemned pursuant to the 1887 Delaware statute, and not just to those lands actually re-conveyed. In this regard the apparent fact that Government maps, surveys, and internal memoranda prior to 1975 all referred to the United States' interest in the Deakyne land as an easement, *see Deakyne, supra*, 530 F. Supp. at 1326, is relevant evidence. We remand to give Deakyne the opportunity to show that it was reasonable for his predecessor not to have known, on either of these grounds, that Congress claimed a fee interest.

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9. Although we are dealing with an Act of Congress, of which all persons generally are charged with notice, North Laramie Land Co. v. Hoffman, 268 U.S. 276, 283 (1925), we cannot say on the record before us that the Act in question "relate[s] to matters in which the general public were concerned, [so that] all were bound to take notice of its provisions," Ketcham v. St. Louis, 101 U.S. 306, 316 (1879). We would not hesitate to charge with such notice a claimant to land actually conveyed by such an Act. The Deakyne land, however, although adjacent to land that was the subject of the Act, was not actually mentioned therein, and it therefore is less clear that Deakyne's predecessor in interest should be charged with notice that the United States had intended to convey a fee. It is true that we now have so interpreted the Act, but we have reached that conclusion only after some fairly involved reasoning and with the help of the Act's legislative history. We therefore hold that Deakyne's predecessor may fairly be charged with notice that the United States intended to reconvey a fee in adjacent lands unless, on remand, Deakyne can show that facts external to the 1924 Act establish that the land reconveyed was in fact owned by the State prior to 1887 and thus was never condemned. Such a showing would permit the district court to find that Deakyne's predecessor in interest could reasonably have understood the reconveyance to have been of no more than an easement.

II.

We turn to Deakyne's cross-appeal. Deakyne alleged in the district court that the Government abandoned its easement in 1912, when it changed its original plans and chose not to build the canal on the land Deakyne now claims. The district court held the abandonment claim barred because more than twelve years had passed since the event that allegedly effected the abandonment: the re-routing of the canal in 1912. 530 F. Supp. at 1327. We agree with the court's reasoning. Invoking the rationale of *United States v. Western Pacific Railroad Co.*, 352 U.S. 59 (1956), however, Deakyne asserts that because the district court had jurisdiction to determine whether the Government has a fee, and because Deakyne's claim that the Government has abandoned its easement is in the nature of a defense, the court also had jurisdiction to hear that defense.[10] But Deakyne reads *Western Pacific* too broadly, and his argument therefore must fail.

Western Pacific involved a railroad's attempt to recover money allegedly due from the United States for carrying a shipment of napalm. The railroad had billed the United States at the rate provided for "incendiary bombs," but the United States, claiming that napalm did not fit the higher classification, paid at a lower rate. The railroad filed suit in the Court of Claims to recover the difference. The United States raised, *inter alia,* the defense that the rate claimed by the railroad was unreasonable and that, under the doctrine of primary jurisdiction, the court should suspend the proceedings and refer the reasonableness issue to the ICC. The Court of Claims, noting that the suit was filed within the six-year statute of limitations provided for in the Tucker Act

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10. Although Deakyne raises this argument for the first time on appeal, we will discuss it because it involves our jurisdiction.

for claims over which the Court of Claims has jurisdiction,[11] but beyond the two-year period provided for in the Interstate Commerce Act for rate determinations by the ICC,[12] ruled on the merits in favor of the railroad but refused to refer the unreasonableness defense to the ICC. The Supreme Court reversed, holding that issues raised by way of defense in a suit that is itself timely brought are not time-barred even though an affirmative action before the ICC by the party raising the defense might have been so precluded.[13]

Deakyne attempts to fit the present suit into this mold by characterizing his claim that the United States abandoned its easement as a "defense" to a putative attempt by the Government to have its easement claim adjudicated. *Western Pacific* is, however, inapposite. In the first place, *Western Pacific* addressed a rather unusual set of concerns: the plaintiff carrier there was able to institute suit beyond the two-year limitations period found in the Interstate Commerce Act only because the shipper was the United States, suits against which are governed by the Tucker Act with its six-year limitations period. It is only the disparity between the two limitations periods, a disparity tied to the identity of the defendant, that enabled the plaintiff to argue that defendant's issue could be barred while its own lawsuit was not.[14]

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11. 28 U.S.C. §2501 (1976).

12. 49 U.S.C. §16(3)(a) (1976) (recodified at 49 U.S.C. §11706(a) (Supp. IV. 1980)) (limit changed to 3 years).

13. The Court assumed, without deciding, that a proceeding brought by the United States before the ICC would be time-barred after two years.

14. This disparity no longer exists. *See* 49 U.S.C. §11706(f) (Supp. IV 1980) (3 year time limitation on actions by or against a common carrier "applies to transportation for the United States Government.")

Indeed, the Supreme Court made it clear that its primary concern was to avoid bestowing upon the carrier the tactical advantage against the United States that a contrary ruling would afford: "[o]nly the clearest congressional language could force us to a result which would allow a carrier to recover unreasonable charges with impunity merely by waiting two years before filing suit." 352 U.S. at 71. The United States is clearly in no such position here. The Government did not control the timing of litigation, and, in fact, the limitations period on the United States' easement claim had elapsed before Deakyne ever had the right to bring his suit against the United States.[15]

Second, the Government does not "affirmatively seek[] . . . a declaration of its interest"[16] from the court, unlike the carrier in *Western Pacific*. Its contention is simply that the district court did not have jurisdiction to adjudicate the claim because the United States has not consented to be sued where plaintiff or his predecessor in interest has had more than twelve years' notice of the United States' assertion of an interest in land. Deakyne's abandonment claim is thus not a "defense" in the *Western Pacific* sense, for it is not a response to a substantive claim. Because the Quiet Title Act was not passed until 1972, Deakyne has never had a right to an adjudication of the United States' claim to an easement, and the Corps of Engineers' change of position in 1975, claiming a fee simple, did not confer on Deakyne any such right.

III.

The judgment in No. 82-1162 will be affirmed. The judgment in No. 82-1248 will be vacated and the case remanded for further proceedings consistent with this opinion.

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15. Section 2409a was enacted in 1972, sixty years after the events alleged to have constituted abandonment.

16. Appellant's Brief at 12.

Opinion

TO THE CLERK:

Kindly file the foregoing opinion.

s/ E. Becker
Circuit Judge

DATED:

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED MARCH 4, 1983

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 82-1162 and 82-1248

DAVID W. DEAKYNE

vs.

DEPARTMENT OF THE ARMY, PHILADELPHIA DISTRICT, CORPS OF ENGINEERS, and UNITED STATES OF AMERICA 2nd and Chestnut Streets Philadelphia, Pennsylvania

David W. Deakyne, Appellant in No. 82-1162

Department of the Army, Appellant in No. 82-1248

(D.C. Civil No. 78-0344)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE _____ DISTRICT OF DELAWARE

Present: ADAMS, HUNTER, and BECKER, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the _____ District of Delaware and was argued by counsel September 14, 1982.

Judgment

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered February 16, 1982 be, and the same is hereby affirmed with respect to the appeal at C.A. No. 82-1162, vacated with respect to the appeal at C.A. No. 82-1248, and the cause remanded for further proceedings consistent with the opinion.

ATTEST

s/ Sally Mrvos
Clerk

March 4, 1983

MEMORANDUM OF DECISION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE FILED JANUARY 29, 1982

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 78-344

DAVID W. DEAKYNE,

Plaintiff,

v.

DEPARTMENT OF ARMY, et al.,

Defendants.

OPINION

John H. Benge, Jr., Esq., and Basil C. Clare, Esq., Allmond, Eastburn & Benge, Wilmington, Delaware; attorneys for plaintiff.

Hon. Joseph J. Farnan, Jr., United States Attorney, and John X. Denney, Jr., Esq., Assistant United States Attorney, Department of Justice, Wilmington, Delaware; attorneys for defendants.

Dated: January 29, 1982
Wilmington, Delaware

Memorandum of Decision

SCHWARTZ, District Judge

This action to quiet title was brought by plaintiff, David W. Deakyne, against the United States. Jurisdiction is based on 28 U.S.C. §§1346(f), 1402(d) and 2409a. Presently before the Court are the parties' cross motions for summary judgment.

The dispute concerns the ownership of 2.25 acres of marsh land located in the Town of Lewes, Sussex County, Delaware. In 1887 the State of Delaware by statute committed itself to acquiring and transferring title to certain lands in that area to the Federal Government for use in connection with a proposed inland waterway. 18 Del. Laws tit. 8 Chap. 139 at 210-213 (1887) ("18 Del. Laws"). Pursuant to that statute, along with amendments not relevant here, the commissioners of Lewes condemned the land in question in 1892 and awarded damages to the heirs of John Metcalf, which caused "the title to the lands [to] vest in the United States. . . ." 18 Del. Laws at 211.

The original waterway project, which was authorized by the River and Harbor Act of August 5, 1886, 24 Stat. 310 (1886), was subsequently abandoned and the canal was rerouted. As a result part of the land condemned for the original project was returned to the State of Delaware by Act of Congress. Act of May 31, 1924, 43 Stat. 245 (1925). However, the land in question was not included in that reconveyance.

Plaintiff traces his claim through a series of conveyances to the same John Metcalf whose heirs received the condemnation award in 1892. Further, plaintiff alleges that the commissioners of the Town of Lewes recognized his predecessor in interest's claim by quit claim deed dated May 3, 1963. Plaintiff's Amended Complaint to Quiet Title, ¶4. Plaintiff does not challenge the validity of the 1892 condemnation but argues that by that

proceeding the Government received only an easement which it has since abandoned. The Government contends that it acquired a fee simple absolute which can never be abandoned. In the alternative the Government asserts that if in fact it obtained only an easement, it has never abandoned it. Further, the Government argues that the Court lacks subject matter jurisdiction and that even if it had jurisdiction, plaintiff's cause of action is barred by the twelve year limitation contained in 28 U.S.C §2409a(f).

Jurisdiction

Plaintiff's first amended complaint requested compensation for the wrongful usurpation of his alleged fee title together with attorney's fees and costs. The Government quite properly argued that such a claim exceeded the $10,000 limit set by 28 U.S.C. §1346(a)(2).[1] At oral argument plaintiff requested and was granted leave to file a second amended complaint which expressly limits the damages claimed for the alleged wrongful usurpation to $10,000.

That amendment does not, however, end the matter. The Government contends that the fact that plaintiff seeks to quiet title to land which could well have a market value in excess of $10,000[2] deprives this Court of jurisdiction. The Government

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1. Section 1346(a)(2) provides in part that the district courts shall have original jurisdiction concurrent with the Court of Claims of:

> Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress . . . or for liquidated or unliquidated damages in cases not sounding in tort.

2. Plaintiff's original and first amended complaints alleged a market value of $80,000.

argues that the monetary value of the property at stake controls for purposes of section 1346(a)(2) and that because plaintiff seeks to deprive the Government of property with a value in excess of $10,000 his claim must be brought in the Court of Claims.

It is possible to read the statutory provisions as the Government suggests, but to do so the Court would have to do violence to the meaning of several of the provisions. Subsection (f) of section 1346 provides that:

> The district courts shall have exclusive original jurisdiction of civil action under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

The Government would read the limitation of subsection (a)(2) back into this independent grant of jurisdiction so that subsection (f) would confer jurisdiction only in cases in which the estate or interest was in land valued at less than $10,000. Although it is possible to read section 1346(a) as requiring that result, to do so would render portions of section 2409a meaningless. Section 2409a(a) provides that:

> The United States may be named as a party defendant in a civil action . . . to adjudicate a disputed title to real property in which the United States claims an interest. . .

Nowhere in the statute or the legislative history did Congress evince an intention to limit the Government's amenability to suit to cases involving land valued at less than $10,000. It was originally proposed that jurisdiction be vested in the district courts by adding a new section 1347a to title 28. The legislative history indicates that rather than create a new section, the House Judiciary

Committee simply added the language of the proposed section to section 1346 as the new subsection (f). H.R. Rep. No. 1559, 92d Cong., 2d sess. (1972), *reprinted in* [1972] *U.S. Code Cong. & Ad. News* 4547, 4550. There is no indication that by grafting the provision onto section 1346, as opposed to creating a separate section, Congress intended to limit its effect.

An examination of the legislative history of section 2409a(b) provides further support for this view. Section 2409a(b)[3] provides that if it is determined that the United States is wrongfully occupying land the Government may nonetheless retain possession or control of the property by paying damages in an amount to be determined by the district court to the person entitled to compensation. Keeping in mind that the source of jurisdiction for the Court's award of just compensation under section 2409a(b) is the same section 1346(f) at issue here, it is significant that the House Report distinguishes the remedy provided by section 2409a(b) from that provided under the existing provisions of section 1346 by noting "that the district courts would have jurisdiction without regard to any jurisdictional amount such as

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3. The text of 28 U.S.C. §2049a(b) provides:

> The United States shall not be disturbed in possession or control of any real property involved in any action under this section pending a final judgment or decree, the conclusion of any appeal therefrom, and sixty days; and if the final determination shall be adverse to the United States, the United States nevertheless may retain such possession or control of the real property or any part thereof as it may elect, upon payment to the person determined to be entitled thereto of an amount which upon such election the district court in the same action shall determine to be just compensation for such possession or control.

that contained in section 1346a(2)." H.R. Rep. No. 1559, 92d Cong., 2d Sess. (1972),*reprinted in* [1972] *U.S. Code Cong. & Ad. News,* 4547, 4552. *Accord, United States v. Drinkwater,* 434 F. Supp. 457, 463 (E.D. Va. 1977).

Based on the foregoing the Court concludes that section 1346(f) confers jurisdiction on the district courts to hear actions under section 2409a to quiet title to an estate or interest in real property in which the United States claims an interest without regard to the value of the land involved.

Statute of Limitations

It was not until October 25, 1972, with the enactment of 28 U.S.C. §2409a that the United States consented to be sued in actions to quiet title. Prior to that date, the Government was, with a few limited exceptions, immune to such suits. *See Buchler v. United States,* 384 F. Supp. 709, 710 (E.D. Cal. 1974). As originally proposed, that statute would have been fully retroactive. The statute of limitations, section 2409a(f), would have allowed any action to have been brought within six years after the claim accrued or within two years of the effective date of the Act, whichever was later. The office of the Attorney General opposed the original version on the basis of the administrative burden which it would have placed on the Government. It suggested a different approach which was in fact adopted by Congress in subsection (f). [1972] *U.S. Code Cong. & Ad. News,* 4552-4553.

As enacted section 2409a(f) provides:

> Any civil action under this section shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the

> plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

Given the clear legislative intent to limit the statute's retroactive effect, those courts which have addressed the issue have unanimously held that a plaintiff's action under section 2409a accrues when he or his predecessor in interest knew or should have known of the Government's claim, even if an action to quiet title could not have been brought at that time. *Knapp v. United States,* 636 F. 2d 279 (10th Cir. 1980); *Stubbs v. United States,* 620 F. 2d 775 (10th Cir. 1980); *Grosz v. Andrus,* 556 F. 2d 972 (9th Cir. 1977); *Hatter v. United States,* 402 F. Supp. 1192 (E.D. Cal. 1975); *Buchler v. United States,* 384 F. Supp. 709 (E.D. Cal. 1974).

There is no question that plaintiff's predecessors in interest knew that the Government claimed an interest in the land at issue. The plaintiff's remote predecessors in interest were, after all, the condemnees themselves. The instant dispute concerns the meaning of the phrase "claim of the United States." The government argues that inasmuch as plaintiff's predecessors knew that the government claimed some interest, if only an easement, as far back as 1892, his claim must now be barred. It asserts that the type of interest originally claimed is unimportant; a plaintiff who knows or should know that the Government claims an interest must bring an action to quiet title within twelve years. Thus, according to the Government, if the United States claims any interest in a tract of land, however limited or undisputed, the fee owner must bring an action within twelve years or be forever barred.

In support of this somewhat novel theory the Government cites *Hatter v. United States,* 402 F. Supp. 1192 (E.D. Cal. 1975). In *Hatter* the plaintiffs brought an action under section 2409a.

In response to the Government's assertion that their claim was time barred, plaintiffs argued that their predecessor in interest knew only that the Government claimed some type of equitable interest in the land. The Court noted that the facts indicated that plaintiffs' predecessor in interest knew of the Government's claim of ownership at least as early as 1950, some twenty-four years before the complaint was filed. Given the existence of that knowledge the Court was not troubled by the distinction between legal and equitable claims and held that section 2409a(f) served to bar both.

A similar situation arose in *Park City, Montana v. United States,* 454 F. Supp. 1 (D. Mont. 1978), *aff'd,* 626 F. 2d 718 (9th cir. 1980), *cert. denied,* 449 U.S. 1112 (1981). Two counties sued under section 2409a to quiet title to a road right-of-way which they allegedly established in 1893. The land in question had been included in a national park since 1902 and the major portion of the claimed right-of-way traveled a route which followed two Forest Service trails which had been maintained by the Government since the early part of the century. Nevertheless the Court held that the counties' cause of action did not accrue until 1962 when the Government claimed ownership and jurisdiction of the area by posting notice of its interest. In that context, where again the Government had asserted its claim in no uncertain terms, the Court, citing *Hatter,* noted that the exact nature of the interest claimed, legal or equitable, was of no practical significance. 454 F. Supp. at 3.

It is of course true that "[q]uiet title actions are . . . not merely actions to settle title, but also actions to remove any clouds of title, whether legal or equitable." *Hatter v. United States,* 402 F. Supp. at 1195. However, it does not follow that knowledge of a claim of ownership can or must be imputed from knowledge of any claim at all. In both *Hatter* and *Park City* the plaintiffs

knew that the Government claimed some interest which adversely affected their claims more than twelve years before they brought suit. In this case the Government first gave notice that it claimed a fee in 1973. Prior to that time the Government referred to its interest as an easement and it was so denominated in the Government's maps, surveys[4] and internal memoranda.[5] Indeed, in response to an earlier inquiry by plaintiff's counsel, the District Engineer of the Corps of Engineers stated that the Government's interest was a perpetual easement and that its records did not disclose any acquisition in fee simple.[6] The Government's own witness testified at deposition that there was no reason that plaintiff should have known at any time between 1963 and 1973 that the Government claimed fee title.[7] Indeed, it was not until plaintiff requested that the land in question be released from the lien of the easement that the Government asserted that its interest was a fee.[8] Based on the foregoing undisputed evidence, the Court finds that neither plaintiff nor his predecessors in interest knew or should have known that the Government claimed anything more than a perpetual easement prior to 1973 and that plaintiff's challenge to that claim, filed in 1978, is timely. *See Knapp v.*

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4. Defendants' Answers to Plaintiff's Interrogatories 1(a), 1(b) ("Defendants' Answers"). Deposition of Gerald R. Boggs, Chief of Real Estate Baltimore District Corps of Engineers at 10 ("Boggs Deposition").

5. Letter from Acting Attorney General, November 3, 1892, Exhibit 43 to Certified Brief of Title filed by the Government.

6. Exhibit C to Plaintiff's First Amended Complaint.

7. Boggs Deposition at 24.

8. Boggs Deposition at 18-19.

United States, 636 F. 2d 279, 283 (10th Cir. 1980) (Government must claim some interest adverse to plaintiffs).

That finding does not end our inquiry. Plaintiff's claim, as summarized above, has two distinct elements: that the Government acquired only an easement in 1892, and that that easement has since been abandoned.[9] Plaintiff asserts that the Government's rerouting of the canal coupled with its nonuse of the land for eighty-five years constitute abandonment of any easement obtained in 1892. The Government argues that even if it did obtain an easement, mere nonuse does not constitute abandonment or, in the alternative, it constitutes a factual issue precluding the granting of summary judgment. The Court need not decide whether the Government's actions could support a finding of abandonment, for whatever the merit of plaintiff's argument, the facts on which it is based have or should have been known to him and his predecessors in interest since 1912 when the project was rerouted. Whatever additional period of nonuse might be required over and above the actual rerouting existed prior to 1966.[10] Plaintiff's

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9. Neither party separately addressed the issue of section 2409a(f)'s application to plaintiff's abandonment claim as applied to the statutory waiver of sovereign immunity. Because the statute of limitations is jurisdictional, the Court was obliged to raise the issue at oral argument *sua sponte*. Park City, Montana v. United States, 454 F. Supp. 1 (D. Mont. 1978), *aff'd*, 626 F. 2d 718 (9th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981); *see* Munro v. United States, 303 U.S. 36 (1938). Given its importance, the parties were given leave to file post argument memoranda on this single issue.

10. Although by no means certain, plaintiff apparently concedes this point when he admits he "may be too late to challenge the United States' position that was taken in 1963." Plaintiff's Reply Memorandum to Defendants' Answering Memorandum on the Single Issue at 3.

abandonment claim is therefore barred by the twelve-year limit of section 2409a(f).[11]

The Government's Interest

Having determined that plaintiff's action, at least insofar as it seeks a determination that the Government's interest is limited to a perpetual easement, is not barred by section 2409a(f), the Court's task becomes one of statutory interpretation. The Government's interest was acquired pursuant to the 1887 Delaware statute which provides in part:

> That the consent of the Legislature be and the same is hereby given to the acquisition by the Government of the United States of the title to such lands . . . as may be necessary for the location and construction of the said canal and its appurtenances:
>
> * * *
>
> [If the United States cannot otherwise obtain the land required the state will condemn it] and when such condemnation shall have been made and the condemnation money paid . . . the title to the lands so condemned shall forthwith vest in the United States.

18 Del. Laws at 210-11.

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11. In holding that plaintiff's abandonment claim is barred by the statute of limitations, the Court expresses no opinion on the merits of that claim.

The difficult issue before the Court is whether the above quoted language resulted in the taking of a fee or of an easement. The Government concedes that when land is condemned for a canal the Government acquires only an easement unless a contrary intention is expressed in the statute which authorizes the condemnation. Defendants' Answering Brief at 5. Such statutes are strictly construed and though no "sacramental words" are required, "unless the Statute provides that a fee simple title shall be acquired, or a fee is necessary for the purposes for which the land is taken, . . . only an easement or qualified fee is taken by the Eminent Domain proceedings."[12] *Thomison v. Hillcrest Athletic Ass'n,* 39 Del. 590, 595, 5 A. 2d 236, 238 (Del. Super. 1939); *accord,* 3 *Nichols on Eminent Domain,* §9.2[2] (3d ed. 1980).

The Government acknowledges that a fee interest is not required to build a canal, an easement will suffice. Defendants' Answering Brief at 5. Instead it argues that the language of the statute, particularly the phrases "title to such lands" and "title shall forthwith vest," indicates the intent of the Delaware legislature to acquire and convey a fee, and that in any event the determination of that intent is a factual issue.

As this matter is before the Court on a motion for summary judgment, the Government's last contention must be addressed first. A party moving for summary judgment bears a heavy burden. If any material factual issues are in dispute, the motion must be denied. *Pettinaro Construction Co., Inc. v. Delaware Authority*

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12. Inasmuch as it is a Delaware statute which must be construed, the Court must look primarily to Delaware decisions. The Delaware courts are, after all, the most qualified interpreters of that State's law. Commissioner v. Estate of Bosch, 387 U.S 456 (1967).

for Regional Transit, 500 F. Supp. 559 (D. Del. 1980); *Carpenter International, Inc. v. Kaiser Jamaica Corp.,* 369 F. Supp. 1138 (D. Del. 1974). In order to determine whether such issues exist, the Court has the power and the obligation "to penetrate the allegations of fact in the pleadings and look at any evidential source to determine whether there is an issue of fact to be tried." *Tomalewski v. State Farm Life Ins. Co.,* 494 F. 2d 882, 884 (3d Cir. 1974), *quoting Mintz v. Mathers Fund, Inc.,* 463 F. 2d 495, 498 (7th Cir. 1972).

It is of course true, in a theoretical sense, that a finding of intention is a factual determination. Often in the context of a contract dispute the need for such a determination, calling for the examination of extrinsic evidence, will preclude the granting of summary judgment. *See, e.g., Anthony P. Miller, Inc. v. Wilmington Housing Authority,* 179 F. Supp. 199 (D. Del. 1959). In this case, however, the Court is called upon to determine *legislative* intent. Such a determination is peculiarly within the province of the Court. 2A C. Sands, *Statutes and Statutory Construction,* §45.03 at 11 (4th ed. 1973).

Plaintiff argues that the terms "vest" and "title" can be used in reference to less than fee interests in land. *See Dover Veterans Council, Inc. v. Dover,* 119 N.H. 738, 407 A. 2d 1195 (1979) (term "title" has been used to describe any estate or interest); *Pennsylvania Game Comm'n v. Renick,* 21 Pa. Cmwlth. 30, 342 A. 2d 824 (1975). Thus, he argues, the mere fact that these words were used is insufficient to overcome the presumption in favor of the lesser taking. Plaintiff also argues that because the statute specifies the purpose for which the land was acquired, even if the Government obtained a fee it was limited by an implied condition,*i.e.,* that the land be used to build a canal.[13] In addition,

13. It is conceded that the Government does not now intend to construct a canal on the land in question and has in fact solicited bids for commercial leases. Defendants' Answers 1(n), 1(o).

plaintiff asserts that the Government is estopped from asserting a fee simple interest in the land in question because the Corps of Engineers had disclaimed any fee interest in 1963. As to the latter contention, plaintiff conceded at oral argument that he could demonstrate no detrimental reliance. As a consequence there could be no estoppel. The Court therefore does not reach the Government's contention that the doctrine of estoppel is inapplicable in the context of the instant case.

Plaintiff's next contention can also be dealt with quickly. Although conditions may be implied when all or most of the consideration for a conveyance is the accomplishment of a specific purpose, the mere recital of the purpose for which the property is to be used does not create a condition. *First Presbyterian Church v. Bailey,* 11 Del. Ch. 116, 97 A. 583 (1916). Plaintiff argues that the consideration involved here, twenty dollars for approximately twenty acres of land, is so deficient that it must have been intended that the canal itself would serve as a supplemental consideration. Although it is true that the commissioners appointed by the 1887 statute were specifically instructed to consider the advantages as well as the disadvantages accruing to the condemnees by reason of the subsequent construction of the canal, 18 Del. Laws at 210-12, plaintiff's argument must fail. Whatever its value today, in 1892 the land in question was unimproved marsh land. Neither party has been able to supply or represent to the Court that they could at trial supply any evidence as to the fair market value of such land in 1892.[14] The dispute must therefore be resolved without reference to such evidence.

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14. A determination that fair market value had been paid would not determine the issue as that value is often the basis of condemnation awards even when less than a fee is taken. Thomison v. Hillcrest, 39 Del. 590, 596, 5 A. 2d 236, 239 (Del. Super. 1939).

Some slight support for the Government's interpretation of the 1887 statute can be found in the course of subsequent events. As noted, in 1924 Congress returned part of the land originally condemned for the project to the State of Delaware. The following year the State granted, quit claimed and reconveyed that land to the "Commissioners of Lewes." 34 Del. Laws tit. 1 Chap. 145 at 365-66 (1925). If as plaintiff suggests the Government's interest is only an easement, it might be argued those lands, which had been condemned pursuant to the same 1887 statute, should have reverted to the original condemnees, their heirs or assigns.

Judging the intent of a legislature which met almost a century ago is difficult. The acts of the 1925 legislature are of some help in that regard but are at best secondary sources as to the intent of its predecessor. Similarly, only ambiguous insight can be gained from the Government's eighty-one year treatment of the interest in question as an easement. The primary task remains the ascertainment of the 1887 legislature's intent in using the words "title" and "vest." As defendant notes the words can connote a taking in fee. Both parties rely heavily on *Thomison v. Hillcrest Athletic Ass'n,* 39 Del. 590, 5 A. 2d 236 (Del. Super. 1939), the only Delaware case Court or counsel have found which discusses the issue. In *Thomison* the Court held that in condemnation proceedings held pursuant to a statute which provided that the land would become the property of a school district for school purposes only, a limited estate was taken. Although differences in the wording of the statute involved in *Thomison* preclude reliance on the court's holding, defendant urges reliance on its rationale for distinguishing three cases from other jurisdictions. The Court noted that in each case the statute had provided for the vesting of title in the condemnor. It was those words, in the Court's opinion, that convinced the courts in the cited cases that the statutes relied on "imported the transfer of the fee simple title." 39 Del. 596-98, 5 A. 2d at 239; *accord, Valentine v. Lamont,*

25 N.J. Super. 342, 96 A. 2d 417, *aff'd,* 13 N.J. 569, 100 A. 2d 668 (1953),*cert. denied,* 347 U.S. 966 (1954).

The Court recognizes that its task in this case is to predict what the Delaware Supreme Court would decide if it were presented with this issue. *McKenna v. Ortho Pharmaceutical Corp.,* 622 F. 2d 637 (3d Cir.), *cert. denied,* 449 U.S. 976 (1980). Although helpful in that regard, *Thomison,* a trial court opinion, is not dispositive. Moreover, the portion of the opinion upon which defendant relies is dicta of the weakest kind. The court did not hold that the presence of the words "title" and "vest" in an eminent domain statute resulted in the condemnation of a fee, it merely distinguished the holdings of three cases from other jurisdictions on that basis.

As noted, the words "title" and "vest" have no fixed meaning in the law. Given the absence of authoritative Delaware precedent, I conclude that if presented with the issue the Delaware Supreme Court would hold that the 1887 statute is not sufficiently unambiguous to overcome the strong presumption in favor of the taking of an easement. The Government's interest in the land in question is therefore limited to a perpetual easement.

Conclusion

Based on the foregoing the Court concludes that 28 U.S.C. §§1346(f), 1402(d) and 2409a confer subject matter jurisdiction on this Court to hear plaintiff's claim to quiet title to land in which the Government claims an interest without regard to the value of the land involved. However, that jurisdictional grant is limited by the provisions of 28 U.S.C. §2409a(f) which bar any such actions not brought within twelve years of when they accrued. On the facts of this case, section 2409a(f) does not bar plaintiff's claim that the Government's interest is limited to an easement;

it does, however, bar his claim that the easement has been abandoned. Reaching the merits of plaintiff's claim, the Court concludes, based on its examination of the 1887 statute and the relevant case law, that the Government's interest is limited to a perpetual easement.

Submit order on notice within ten days.

ACT OF MARCH 15, 1924 S. 2431

UNION CALENDAR NO. 282

S. 2431

[Report No. 672]

68th CONGRESS
1st Session

IN THE HOUSE OF REPRESENTATIVES

March 15, 1924

Committed to the Committee of the Whole House on the state of the Union and ordered to be printed

AN ACT conveying to the State of Delaware certain land in the county of Sussex, in that State.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the United States hereby grants, quitclaims, and reconveys to the State of Delaware all that certain piece or parcel of land situate in Lewes and Broadkill Hundred, Sussex County, and State of Delaware, bounded and described as follows: Beginning at a stone, marked "U.S. 1," on the beach opposite the town of Lewes, Delaware, and located as follows: Bearing to Henlopen Light south eighty degrees forty minutes east: angle between Henlopen Light and Saint Peter's spire one hundred and fourteen degrees twenty-three minutes and fifteen seconds; angle between Saint Peter's spire and Greenhill Light eighty degrees thirty-three minutes and fifty-five seconds; angle between Greenhill Light and Upper Breakwater Light one hundred and twenty-two degrees thirty-two minutes and

thirteen seconds; angle between Upper and Lower Breakwater Lights nine degrees twenty-eight minutes and seventeen seconds; angle between Lower Breakwater Light and Henlopen Light thirty-three degrees two minutes and twenty seconds. Thence southerly one thousand six hundred and thirty feet, more or less, along the arc of a circle of one thousand eight hundred and seventy-two and forty-one one-hundredths feet radius to the north side of South Street, the center of said circle, bearing south fifty-nine degrees thirteen minutes east from said stone; thence south forty-five degrees west two hundred and thirty feet, more or less, along said north side of South Street to lands of the United States of America; thence with said lands in a northwesterly direction one hundred and eighty feet, more or less, to a point; thence leaving said lands, northerly along the arc of a circle of two thousand one hundred and seventy-two and forty-one one-hundredths feet radius having the aforementioned center, one thousand eight hundred and thirty-eight feet, more or less, to a point which is three hundred feet distant from the place of beginning; thence north thirty degrees forty-seven minutes east five hundred and seventy-five feet, more or less, to the low-water line of the Delaware Breakwater Harbor; thence easterly along said low-water line three hundred and twenty feet, more or less; thence south thirty degrees forty-seven minutes west six hundred and fifty feet, more or less, to the place of beginning; containing sixteen and seven-tenths acres, more or less.

Passed the Senate March 14, 1924.

Attest: GEORGE A. SANDERSON,
Secretary.

LETTER FROM SECRETARY OF WAR TO SENATOR WADSWORTH

Hon. James W. Wadsworth, Jr.

Chairman Committee on Military Affairs, United States Senate

My Dear Senator:

I acknowledge your reference to this department of Senate bill No. 2431, to authorize the Secretary of War to convey to the commissioners of Lewes certain land in the county of Sussex, State of Delaware.

In the river and harbor act of 1886 Congress adopted a project for an inland waterway, partly natural and partly artificial, from Chincoteague Bay to Delaware Bay. The State of Delaware, in pursuance of an act of its legislature, passed April 4, 1887, and supplements thereto, acquired by condemnation the lands required as a right of way for this waterway and vested title to the same in the United States free of charge. The parcel described in the bill is a part of the lands thus condemned and conveyed by the State. The original project for the waterway was subsequently repealed by Congress in the river and harbor act of 1905, as a consequence of which this parcel of land was never used and is not now needed by the Government for right-of-way purposes.

The municipal authorities of the town of Lewes desired possession of the parcel and the object of the bill is to authorize its conveyance to them. I know of no objection to the Government's relinquishing its title but, as the State of Delaware condemned and paid for the land and donated it to the Government for a special purpose for which it is no longer needed, it is thought that good faith requires that it be returned to the

State rather than to anyone else. If reconveyed to the State, the town of Lewes may secure possession of it through the action of the State authorities.

I accordingly recommend that the bill be so amended as to make a direct reconveyance of the parcel to the State of Delaware and that, as thus amended, it be given favorable consideration. A copy of the bill amended in accordance with this recommendation is herewith.

Sincerely yours,

John W. Weeks,
Secretary of War